



MITCHELL SILBERBERG & KNUPP LLP  
A LAW PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

Eleanor M. Lackman  
Partner  
(212) 878-4890 Phone  
eml@msk.com

December 27, 2021

**By ECF**

Honorable James L. Cott  
United States Magistrate Judge, S.D.N.Y.  
500 Pearl Street, Room 1360  
United States Courthouse  
New York, NY 10007

Re: Tom Hussey Photography, LLC v. BDG Media, Inc., 21-cv-03514 (AT)(JLC)

Dear Judge Cott:

On behalf of defendant BDG Media, Inc. (“BDG”), we write to the Court regarding a specific issue that remains between the parties that is preventing the conclusion of this matter, and to seek the Court’s assistance in reaching a resolution that we expect will bring about such a conclusion. In particular, as the Court is aware (ECF Nos. 75, 80), the parties have some disagreement pertaining to the handling of documents previously designated by BDG as confidential or highly confidential.

At a time following Your Honor’s December 2 order, plaintiff Tom Hussey Photography, LLC (“THP”) appeared amenable to the “return” of certain documents that it listed to us. However, BDG has since identified designated documents that were not on THP’s list. BDG also has requested that because such documents were provided digitally, all such documents be destroyed rather than “returned,” given that the process of sending digital copies back to BDG would result in the creation of additional copies, rather than effectuating the intent of the purpose of “return.”

THP’s counsel has insisted in response to these items that before he entertains any further discussion of the issue pertaining to the handling of designated documents, BDG must send back an executed form of an agreement that THP sent in redline on December 18, 2021. While we believe that BDG may be able to accept the changes in the draft, even though they do give BDG some pause, BDG is not comfortable releasing THP and otherwise letting the Court’s jurisdiction go without having the confidentiality issue resolved. BDG’s concerns are compounded by the way that THP has reacted to the request that copies of documents be destroyed rather than receiving a file containing a copy of what BDG sent to THP during discovery. At this point, BDG can conclude only that THP does not intend to ensure that it and its client will not maintain or otherwise make use of the designated documents.

BDG has made numerous attempts to appeal to reason and avoid raising this matter with the Court. None has advanced the discussions. Rather each attempt is met by more unfounded, unnecessary, and lengthy attacks and accusations, along with the threat that the parties’ agreement in principle reached on November 9, 2021 (subject to a mutually satisfactory formal agreement) already is a binding settlement agreement, and therefore if the matter is not resolved by January 10, 2022, BDG will be in breach and that the case will additionally be reopened. BDG disagrees on all counts and



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has noted that cooperation on all sides may avoid further disputes, but appeals to reason have been unsuccessful and have led only to more invective on a topic that should not be controversial.

Accordingly, BDG has no reasonable option but to respectfully request that as soon as the Court has availability, the Court schedule a short conference with the parties to address the form of handling documents marked confidential, as well as any disputes about what documents are so-designated. BDG further requests that the case remain open, pending resolution of this issue, and that the Court confirms that the parties are under no obligation of performance under an agreement that has not been fully executed. THP stands by its position regarding the agreement and has indicated that it does not agree to any further extensions of the January 10, 2022 deadline.

We regret that the parties were unable to resolve this issue without the Court's involvement, particularly during the holiday season, and we thank Your Honor for its time and its attention to this matter.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "EML".

Eleanor M. Lackman  
Partner of  
MITCHELL SILBERBERG & KNUPP LLP

EML

cc: All counsel of record (via ECF)